



National Conference of Editorial Writers

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Feb. 11, 2005

The Honorable John Cornyn
Senate of the United States

Re: The OPEN Government Act of 2005

Dear Sen. Cornyn:

The National Conference of Editorial Writers (NCEW) is a nonprofit professional organization that exists to improve the quality of editorial pages and broadcast editorials and to promote high standards among opinion writers and editors. Our 585 members come from all regions of the country and have a variety of political views. We are, however, unified in our belief that an open government and access to public records is essential to the well-being of the nation's democracy. We therefore strongly support your efforts to improve open government standards with the Openness Promotes Effectiveness in our National Government Act of 2005, the "OPEN Government Act of 2005".

The act would bolster section 525 of title 5, United States Code, commonly referred to as the Freedom of Information Act, by reaffirming Congress' commitment to an open government, protecting existing FOIA provisions, guarding against the creation of future loopholes that could undermine the public's access to government records, ensuring that agencies have strong incentives to act on FOIA requests in a timely manner and providing federal officials with the tools that they need to maintain an open and accessible government.

We draw your attention to several of the most important provisions of the Act:

1) The congressional findings of the act would reaffirm the original intent of Freedom of Information Act, which was signed into law on July 4, 1966. The U.S. Supreme Court has repeatedly upheld the presumption of openness contained in FOIA and a strong statement from the Congress would remind federal agencies of this.

- 2) In an age of rapidly changing notions of the media, the act would clarify who counts as a member of the media for fee status. By requiring agencies to take into account the full body of a requestor's work as well as the intended use of the requested material, modern journalists who only lack an institutional affiliation at the time of their request will not face high fees to which their peers are immune. This will help maximize the opportunity for dissemination of public information.
- 3) The act would close a loophole that has recently been exploited by the General Services Administration to keep secret government records held by private contractors. Although the GSA has reportedly stopped that practice, the loophole remains in place and could be abused again. The public has an interest in government records wherever they are held.
- 4) The act would also ensure that legitimate FOIA exemptions created by Congress are themselves done so in the open. Congress reserves the right to create exemptions to FOIA that are in the national interest, but under current laws, those exemptions can be written into other bills, obscuring their existence until after they have been signed into law. The act would require Congress to state explicitly that it is creating a new FOIA exemption, so-called (b)(3) exemptions, thereby allowing full debate and consideration before new information is removed from public scrutiny.
- 5) The Homeland Security Act of 2002 created broad nondisclosure provisions for "critical infrastructure information" that is voluntarily disclosed to the Department of Homeland Security by private companies and state and local governments. Although the intent of this provision, to encourage full disclosure to the department, is legitimate, there exists the potential for abuse. The OPEN Government Act would not eliminate this provision, but it would require the Comptroller General to report on the applications of the provisions and whether it has increased the protection of critical infrastructure. That will give Congress the information it needs to determine if the exemption is being applied appropriately or if it should be modified.
- 6) The act contains several provisions to improve responsiveness to FOIA requests from federal agencies. Most important, it would require specified tracking measures for individual FOIA requests and that agencies establish a telephone hotline or Internet service to allow requestors to monitor the status of their requests. It would also establish a FOIA ombudsman under the Administrative Conference of the United States who would be charged with mediating disputes between requestors and agencies, thereby avoiding litigation and promoting good government practices.
- 7) The act would improve the responsiveness of agencies to FOIA requests within the legal allotted time. It would impose real consequences on agencies that fail to respond within the current 20-day (excluding weekends and holidays) period. Current provisions only allow a requestor to file suit if an agency fails to respond within 20 days. Under the act, an agency that misses the deadline would waive the right assert various exemptions, except in cases where disclosure would harm national security, intrude upon personal privacy, disclose proprietary information or is otherwise affirmatively prohibited by law. The act also would give the Office of

Special Counsel the authority to take disciplinary action against government officials who arbitrarily and capriciously deny disclosure. The relevance of public documents is often time-dependent, and a requestor should not be subject to undue delay in receiving public information.

The OPEN Government Act of 2005 will provide important reaffirmation of and enhancement to the free flow of information to the people from their government. The National Conference of Editorial Writers strongly supports your introduction of the act and urges the Congress to approve it.

Sincerely,

Kay Semion
President, NCEW

Christian Trejbal
Freedom of Information Chair, NCEW